IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

FRIDAY, THE 23RD FEBRUARY 2007 / 4TH PHALGUNA 1928

SA.No. 492 of 1992(A)

AS.246/1988 of DISTRICT COURT, THALASSERY
OS.84/1987 of SUB COURT, PAYYANNUR

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APPELLANT: - (1ST RESPONDENT/PLAINTIFF)

THAZHATH VALAPPIL PRASANTH
S/O.DEVAKI AMMA
RESIDING AT VELLUR AMSOM
KANDOTH DESOM.

BY ADV. SRI.D.KRISHNA PRASAD

RESPONDENTS: - (APPELLANTS AND 2ND RESPONDENT/DEFENDANTS 2 TO 6)

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1) KALLIANI.
2) MADHAVI. (DIED)6.

3) KRISHNAN.
4) KUNHIRAMAN (DIED)
5) DEVAKI.

ADDL.R6 TO R11 IMPLEADED. SUPPLEMENTAL RESPONDENTS
12 TO 16 IMPLEADED.
(RESPONDENTS 1 TO 4 ARE RESIDING AT VELIYATTU, PARAVANTHATTA,
KOROM AMSOM AND DESOM, AND RESPONDENT NO.5 IS RESIDING AT
THAZHATH VALAPPIL, VELLUR AMSOM, KANDOTH DESOM.
ADDL.R6. VELIYATT SANTHA,
W/O.MAPPIDACHERRY APPU,
PALTHARA, POST VELLUR, VIA.PAYYANNUR.
ADDL.R7. VELIYATT SOUDHAMINI
W/O.THAMARAYIL KUNJIRAMAN,
KOKKODE, POST KOROME, VIA. PAYYANNUR.
ADDL.R8. VELIYATT NALINI
W/O.BALAKRISHNAN, PARAVANTHATTA,
POST KOROME, VIA. PAYYANNUR.
ADDL.R9. SULOCHANA M.
ADDL.R10. NAMITHA
ADDL.R11. NITHIN (RESPONDENTS R9 TO R11 ARE THE
WIFE AND CHILDREN OF DECEASED VELIYATT THAMBAN
PUTHILOTT POST KODAKKAD, VIA THRIKKARIPUR.

(SUPPLEMENTAL RESPONDENTS 6 TO 11 ARE IMPLEADED
AS THE LEGAL REPRESENTATIVES OF DECEASED RESPONDENT NO.2
AS PER ORDER DATED 3/10/2006 IN I.A.1192/2006.

ADDL.R12. PADMINI, M.V.MAVICHERRY, POST PAYYANNUR.
ADDL.R13. PRADEEPAN M.V., MAVICHERRY, DO.
ADDL.R14. PREETHA M.V. , -DO- -DO-
ADDL.R15. PRASHOBKUMAR, -DO- -DO-
ADDL.R16. PRASAD M.V. -DO- -DO-

(SUPPLEMENTAL RESPONDENTS 12 TO 16 ARE IMPLEADED
AS THE LEGAL HEIRS OF DECEASED RESPONDENT NO.4 AS PER
THE ORDER DATED 3/10/2006 IN I.A.1190/2006.

BY ADV. SRI.P.N.KRISHNANKUTTY ACHAN(SR.)
SRI.P.N.RAVINDRAN
SRI.T.SETHUMADHAVAN FOR R2 TO R4
BY ADV.SRI.P.N.K. ACHAN (SR.)
" SRI.MOHANAKANNAN FOR ADDL.R6 TO R11
& ADDL. R12 TO R16.

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 9/02/2007 ALONG WITH SA NO. 332 OF 1994 THE COURT ON THE
23/2/07 DELIVERED THE FOLLOWING:-

M.SASIDHARAN NAMBIAR,J.

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S.A. NO.492/92 & 332/94

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Dated this the day of 2007

JUDGMENT

Appellant is the only son of deceased Velliyattu Narayanan. Appellant filed O.S.169/81 before Munsiff Court, Payyannur on 7.9.81 with his maternal uncle as his next friend. The suit was subsequently returned for presentation before proper court and was represented as O.S.318/82 before Sub Court, Thalasserry. Later it was transferred to Sub Court, Payyannur, and numbered as O.S.83/87. The suit was for partition of twelve items of properties scheduled in the plaint. His mother was the second defendant and grandmother (mother of Narayanan) was first defendant. It was contended by appellant that plaint schedule properties are the self acquired properties of Narayanan and on the death of Narayanan, it devolved upon his wife, second defendant, mother first defendant and son,

plaintiff and each of them are entitled to one share and though Ext.A8 partition deed was executed by defendants 1 and 2, it was against the interest of plaintiff and second defendant did not act in the interest of appellant as his guardian and therefore he is entitled to ignore Ext.A8 and seek partition. It was also contended that though items 1 and 2 of plaint schedule properties are self acquired properties of deceased Narayanan under Ext.A1 marupattam deed of 26.3.59 and item No.3 of the plaint schedule properties belonged to Narayanan under Ext.A2 marupattam deed of 7.2.63 and item No.4 property was purchased by deceased Narayanan as per Ext.A3 assignment deed 20.2.59, they were not included in Ext.A8 partition deed and therefore he is entitled to get partition and separation of his 1/3 shares. It was also contended that appellant is entitled to ignore the alienations made by defendants. On the death of first defendant defendants 3 to 6 were impleaded as her legal heirs. Appellant also

instituted O.S.170/81 before Munsiff Court, Payyannur which was later transferred to Sub Court, Thalasserry and renumbered as O.S.323/82 and again transferred to Sub Court, Payyannur and renumbered as O.S.84/87. That suit was filed by the minor appellant with his maternal uncle as the next friend seeking partition of fifteen items of properties scheduled in the plaint. First defendant therein is the grandmother of the appellant who was also first defendant in O.S.83/87. Sixth defendant is his mother, the second defendant in O.S.83/87. Defendants 2 and 3 are the daughters and defendants 4 and 5 the sons of first defendant, who were later impleaded as defendants 3 to 6 in O.S.83/87. According to appellant, plaint schedule properties jointly belonged to first defendant and her children including deceased Narayanan and on the death of Narayanan, his 1/6th share devolved jointly on the appellant and sixth defendant and appellant is entitled to get his share separated. It was

contended that in answer to the lawyer notice demanding partition, a reply notice was sent intimating that there was no co-ownership properties to be divided and the self acquired properties of Narayanan were divided as per Ext.A8 partition deed and the co-ownership properties of defendants were divided under Ext.A12 partition deed. It was further contended in the plaint that in Ext.A12 partition deed, all the sharers were not parties and is not binding on him and appellant is entitled to get his share separated.

2. First defendant filed a written statement in O.S.83/87 contending that items 1 to 4 are not self acquired properties of Narayanan and therefore they are not available for partition. It was contended that items 5 to 12 the self acquired properties of Narayanan were divided between the sharers under Ext.A8 partition deed and appellant the minor was represented by his mother second defendant and `B` schedule properties thereunder were allotted jointly to the appellant and second

defendant and appellant is not entitled to claim partition. Additional defendants 3 to 6 filed a written statement reiterating the same contentions and additionally contending that after Ext.A8 partition deed, item No.2 of `B' schedule properties was purchased by fourth defendant from second defendant and second defendant also represented appellant as his guardian in Ext.B3 sale deed of 10.3.77 and he constructed a house therein and is residing there and appellant is not entitled to seek partition. In O.S.84/87, defendants 1 to 3 and 5 filed a joint written statement contending that deceased Narayanan had right over only items 4 to 8 of the plaint schedule properties and after his death those properties were divided among his sharers under Ext.A8 partition deed and appellant was represented by the mother in the partition deed and therefore appellant is not entitled to seek a decree for partition of the said properties. It was contended that the remaining properties were the self

acquired properties of Velliyattu Kandan Koran , the Karanavan of the tarwad, who executed Ext.B69 Will on 9.2.1948 bequeathing items 1, 2 and 9 to 12, 14 and 15 to the defendants 1 to 3 and Narayanan had no right over the properties and so appellant is not entitled to claim partition of the properties. It was also contended that plaint schedule items 3 and 13 originally belonged to Cheria Kannan, brother of first defendant, and from him it was obtained by first defendant, and Narayanan had no right over the same and therefore appellant is not entitled to claim a share. It was also contended that after Ext.A8 partition deed, properties obtained by first defendant thereunder and the properties obtained under Ext.B69 Will, were divided under Ext.A12 partition deed on 9.2.81 and the properties were seperated. According to defendants, item No.1 was allotted under Ext.A12 partition deed to defendants 1 to 3 and item No.2 to defendants 2 to 4, item No.3 to defendants 2 to 5 and items 4 to 8 to first defendant and item

No.9 to defendants 2 and 3, item No.10 to defendants 2,3 and 5, item No.11 and 12 to fourth defendant, item No.13 to defendants 2 to 5 and item No.14 to fifth defendant and item No.15 to third defendant and appellant is not entitled to claim any share. Defendants 2 and 4 filed a separate written statement reiterating the same contentions and additionally contending that item No.1 of plaint schedule properties was allotted to defendants 1 to 3 and share obtained by first defendant was gifted in favour of defendants 4 and 5 as per gift deed 9.2.81 and out of item No.15 of the plaint schedule properties 38 cents each were gifted to defendants 2 and 3 and 8 cents each to defendants 4 and 5 and appellant is not entitled to claim any share.

3. Learned Sub Judge framed the necessary issues. Both the suits were tried jointly. On the side of the appellant, he was examined as PW1 and Exts.A1 to A18 were marked. On the side of defendants , fourth defendant in O.S.84/87 (fifth

additional defendant in O.S. 83/87) was examined. Two witnesses, the attestor and scribe of Ext.B69 Will were also examined as Dws.2 and 3. Exts. B1 to B69 were marked.

4. Learned Sub Judge on the evidence found that items 1 to 3 of plaint schedule properties are not the self acquired properties of deceased Narayanan and there is no evidence to prove that Exts.A1 and A2 marupattam deeds were accepted or acted upon and so they are not available for partition. It was found that under Ext.A3 sale deed item No.4 of plaint schedule properties belonged to deceased Narayanan and it was not divided under Ext.A8 and therefore it is available for partition. Learned Sub Judge also found that under Ext.A8 partition deed, other properties belonging to deceased Narayanan were divided on 26.5.75 between the legal heirs and appellant was represented by second defendant mother therein and there is no evidence to prove that the division was unjust or unfair and it is binding on appellant

and he is not entitled to claim partition of items 5 to 12 of the plaint schedule properties, which were already divided under Ext.A8 partition deed. Learned Sub Judge found that on the death of Narayanan, 1/3rd share devolved on his mother, widow and son and appellant is entitled to 11/30 shares. A preliminary decree for partition of item No.4 of `B' schedule property was passed in O.S.83/87 directing division of the said property into 30 equal shares and allotment of 11 such shares to the appellant. The claim for partition of other properties was dismissed. Learned Sub Judge under issue No. 1 to 3 in O.S.84/87 found that first defendant had five children, three sons and two daughters and under Ext.B69 Will executed by Karanavan, properties were bequeathed to first defendant and daughters defendants 1 and 2 and first defendant had 1/3rd right in the property. It was found that on the death of first defendant her 1/3rd right under Ext.A8 properties devolved on defendants 2 to 5 in equal shares and also on the

group of deceased Narayanan, the pre-deceased son. Learned Sub Judge therefore held that `A' schedule properties of A8 partition deed, allotted to first defendant devolved on her children and the group consisting of pre-deceased son on equal shares and defendants 2 to 5 are entitled to 2/10 shares each and the group consisting of appellant and sixth defendant is entitled to two out of 10 shares and in respect of other items which are not covered under Ext.A8, but included in Ext.A12 partition deed, the pre-deceased son, Narayanan had 1/5th share. Holding that the properties were divided under Ext.A12 partition without appellant or sixth defendant and so Ext.A12 partition could be ignored as nonest and one out of six shares available to deceased Narayanan devolved on appellant and sixth defendant, it was held that defendants 2 to 5 are entitled to 2/10 shares each and appellant and sixth defendant to 1/10 shares each. A preliminary decree for partition was passed in O.S.84/87 directing division of plaint

schedule properties into ten equal shares and for allotment of 1/10 share to plaintiff.

5. Defendants 2 to 5 filed A.S.246/88 before District Court, Thalasserry challenging the preliminary decree for partition granted in O.S.84/87. Plaintiff in O.S.83/87 filed A.S.111/89 challenging the dismissal of the claim for partition except item No.4 of plaint schedule properties in O.S.83/87. Learned District Judge heard both the appeals together. On reappreciation of evidence, District Judge confirmed the finding of learned Sub Judge in O.S.83/87 that items 1 to 3 are not the self acquired properties of deceased Narayanan and deceased Narayanan had no right over the same and therefore those properties are not available for partition. The learned District Judge also confirmed the finding of the learned Sub Judge that Ext.A8 partition deed is binding on appellant and properties of Narayanan were divided in Ext.A8 and his mother represented the appellant and Ext.A8 is valid and binding on

appellant and he is not entitled to seek partition and dismissed A.S.111/1989. Learned District Judge on an elaborate consideration of Ext.B69 Will and Ext.A12 partition deed found that there was no case in the plaint that plaint schedule properties in O.S.84/87 were thavazhi properties of first defendant. Learned District Judge also held that recitals in Ext.B69 do not show that the properties bequeathed to defendants 1 to 3 thereunder are to be enjoyed as thavazhi properties of first defendant and Ext.A1 and A2 executed by Narayanan establish that he had no case that the properties were enjoyed as thavazhi properties and therefore Narayanan had no right over the properties bequeathed to defendants 1 to 3 under Ext.B69 and item Nos.3 to 8 which admittedly belonged to deceased Narayanan, were partitioned by plaintiff and defendants 1 and 6 under Ext.A8 partition deed and it is valid and binding on the appellant and therefore appellant is not entitled to claim a share either in the properties allotted to

defendants 1 to 3 under Ext.B69 or to the properties of deceased Narayanan divided under Ext.A8. On that findings learned District Judge set aside the preliminary decree for partition in O.S.84/87 and dismissed that suit also.

6. Plaintiff filed S.A.332/94 challenging the dismissal of A.S.111/89 whereunder the decree in O.S.83/87 was confirmed. He filed S.A.492/92 challenging the judgment in A.S.246/88 whereunder the preliminary decree in O.S.84/87 was set aside. S.A.492/92 was admitted after formulating the following substantial questions of law.

> (i) Whether the lower appellate court has properly interpreted the several recitals contained in Ext.A12 and B69.
>
> (ii) Whether under the facts and circumstances of the case, the lower appellate court was right in reversing the finding of the trial court that the suit

properties are tavazhi properties.

(iii) Are not the suit properties tavazhi properties and is not the plaintiff entitled to a share in the properties as a legal heir of his deceased father Narayanan;

(iv) When the undisputed documents clearly indicate that the properties are tavazhi properties, is it necessary to adduce any further evidence in relation to the same;

(v) Whether under the facts and circumstances of the case, the court below was right in declining to pass a preliminary decree for partition in respect of item Nos. 1 to 8 which admittedly belonged to deceased

Narayanan, solely on the basis of Ext.A8 to which the plaintiff is not a party.

(vi) When properties over which the plaintiff has admittedly a share are sought to be partitioned without the junction of the plaintiff, can he not ignore the said document and seek a fresh partition of the said properties;

(vii) Whether under the facts and circumstances of the case, the court below was right to in not granting a decree in respect to the share due to the plaintiff as a legal representative of deceased 1st defendant."

S.A. 332/94 was admitted formulating the following substantial questions of law.

"Whether under the facts and circumstances of the case courts below were right in declining to grant relief in respect of plaint items 1 to 3 and 5 to 12.

(ii) Whether under the facts and circumstances of the case, Ext.A8 is valid and binding on the plaintiff;

(iii) When admittedly the plaintiff has right over an item of property, can it be denied to him on the basis of document of partition to which he is not a party and when such document does not protect his interests.

7. Learned counsel appearing for the appellant and learned Senior counsel appearing for respondents were heard.

8. Learned counsel appearing for appellant argued that Exts.A1 marupattam deed of 1959 establish that item Nos.1 and 2 of plaint schedule properties in O.S.83/87 were obtained by deceased Narayanan and Ext.A2 marupattam deed establish that item No.3 of plaint schedule properties was obtained by deceased Narayanan in 1963 and Ext.A7 adangal extract establish that tax was paid by deceased Narayanan and on this evidence courts below should have found that Exts.A1 and A2 marupattam deeds were acted upon and items 1 to 3 of the plaint schedule properties are the self acquired properties of deceased Narayanan available for partition. It was also argued that though items 5 to 12 of plaint schedule properties in O.S.83/87 were divided under Ext.A8 partition deed and appellant and second defendant were jointly allotted the properties shown in the`B' schedule thereunder, second defendant was not acting in the best interest of the minor son, and so Ext.A8 is not binding on the appellant and

courts below should have found that all the plaint schedule properties in O.S.83/87 are available for partition ignoring Ext.A8. It was also argued that when courts below found that item No.4 of plaint schedule properties is one of the self acquired properties of deceased Narayanan and it was not included in Ext.A8 partition deed, the partition under Ext.A8 was vitiated and result of collusion and therefore not valid and binding on the appellant. Learned counsel further argued that in any case even if it is taken that Ext.A8 partition deed is binding on the appellant, when `B' schedule properties therein were jointly allotted to appellant and mother, sale of item No.2 of the B schedule properties by mother without seeking permission of the court under Ext.B3 sale deed in favour of fourth defendant is void and courts below should have found that the alienation is not binding on the appellant and he is at least entitled to a decree for partition of item No.2 of plaint `B' schedule properties in

Ext.A8 partition deed, ignoring Ext.B3 sale deed and therefore the decree granted in O.S.83/87 is to be modified. Learned counsel further argued that eventhough a preliminary decree was passed in O.S.84/87 and A.S.246/88 was filed challenging the decree and judgment, there was no case for the defendants in the appeal memorandum that they were not aware of the contentions of the appellant that plaint schedule properties are tavazhi properties and therefore finding of learned District Judge that case of appellant cannot be accepted for want of pleading is unsustainable. Learned counsel relying on the decision of Apex Court in **Kedar Lal v. Hari Lal (AIR 1952 SC 47), Ram Sarup Gupta v. Bishun Narain Inter College (AIR 1987 SC 1242) and Smt.Rajbir Kaur v. M/s.S.Chokosiri & Co.(AIR 1988 SC 1845)** argued that learned District Judge should not have interfered with the finding of trial court for the reason that there was no pleading, when

defendants have no such grievance as no such case was taken in the appeal memorandum. Learned counsel also argued that under Ext.B69 Will, the self acquired properties of the then Karanavan Kandan Koran were bequeathed in favour of tavazhi consisting of first defendant and her daughters, defendants 2 and 3 and their descendants in the female line and therefore the bequest under Ext.B69 is not in favour of defendants 1 to 3 personally but in favour of the tavazhi and the contrary finding of learned District Judge is unsustainable. Relying on the decision of the Madras High Court in **Kuttayi Lakshmi v. Puthia purayil (AIR 1954 Madras 235)** and the decision of this court in **Parvathi Amma Kalliani Amma v. Padmanabha Pillai Krishna Pillai (1956 KLT 803), and in Sathyabhama Amma v. Taluk Land Board, Palghat (1978 KLT 359)**it was argued that the bequest under Ext.B69 is not to defendants 1 to 3 individually but to the tavazhi of first

defendant. Learned counsel argued that no artificial tavazhi was created and instead karanavan bequeathed properties in favour of the existing tavazhi, making it clear that the properties are to be enjoyed by the tavazhi as marumakkathayam property and therefore intention of the testator was clear from Ext.B69 and learned District Judge was not correct in holding otherwise. Relying on Section 88 of Indian Succession Act and the decision of the Apex Court in **K.Ambunhi v.H.G.Bhandary (AIR 1995 SC 2491) and this court in Ganesh Bhandary v. Ambunhi (1989 (2) KLT 882) and Narayana Pillai v. Raghavan Pillai 1986 KLT SN page 15 (Case No.29)** it was argued that the latter clause in Ext.B69 makes it absolutely clear that the bequeathed properties are to be enjoyed as marumakkathayam tavazhi properties and even if there is some doubt on the question whether the former part of the Will is a bequest in favour of defendants 1 to 3

personally, effect has to be given to the last clause in the Will and if so, the bequest could only be interpreted as for the tavazhi and if a harmonious interpretation is given to the different clauses of the Will, it can only be held that the bequest was in favour of tavazhi consisting of first defendant and her children and their descendants in the female line and therefore deceased Narayanan had equal rights over the properties with defendants 1 to 5 and on the death of Narayanan, his one out of six shares right devolved on his widow sixth defendant and son appellant and they are entitled to get a share and therefore a decree for partition should have been granted.

9.Learned Senior counsel argued that courts below rightly appreciated Exts.A1 and A2 and found that they were not acted upon and that factual finding cannot be interfered in the second appeal. It was also argued that both the courts found that Ext.A8 partition deed is valid and is

binding on the appellant and appellant who was then a minor was represented by the mother and properties were jointly allotted to the mother and son under B schedule of Ext.A8 partition deed and appellant is not entitled to claim partition which was rightly refused by courts below in O.S.83/87 and S.A.332/94 is only to be dismissed. Learned senior counsel pointed out that there is no case for appellant anywhere in the plaint that plaint schedule properties in O.S.84/87 were tavazhi properties. It was argued that under Ext.B69 Will Karanavan bequeathed the properties in favour of defendants 1 to 3 alone and not to the tavazhi and there is nothing in Ext.B69 to show that the bequest was in favour of tavazhi as rightly appreciated by the first appellate court. The learned Senior counsel also argued that an artificial tavazhi cannot be created by the act of parties and if the bequest under Ext.B69 was in favour of tavazhi, apart from defendants 1 to 3 other members of tavazhi including defendants 4, 5

and deceased Narayanan would have been included and as they were excluded and properties were given only to the two daughters and the mother excluding other members of the tavazhi, the bequest cannot be interpreted as in favour of tavazhi. Relying on the decision in **Central Banking Corporation v. Padmanabha Pillai Sankara Pillai (ILR TC 723)** and in **Ammukutty v. Sankarankutty Nair (1958 KLT 547)** learned Senior counsel argued that tavazhi in marumakkathayam family must consist of a natural group of persons and cannot be created artificially by consent of parties and as defendants 1 to 3 by themselves will not constitute a tavazhi and their group could only be an artificial group, appellant is not entitled to contend that under Ext.B69 properties belonged to tavazhi and appellant is not entitled to claim a share in the properties. Relying on the decision in **Naina Pillai v. Daivanai Ammal (AIR 1936 Madras 177)** it was argued

that unless the properties were brought to the common hotchpotch by defendants 1 to 3 with the knowledge that the properties are to be treated as tavazhi properties, Ext.A12 cannot be relied on to hold that parties treated the properties as tavazhi properties and learned District Judge rightly found that plaint schedule properties are not tavazhi properties available for partition and instead properties belonged to defendants 1 to 3 and it was divided under Ext.A12 and appellant is not entitled to claim any right or share and there is no reason to interfere with that finding and the appeal is only to be dismissed.

10. In O.S.83/87 appellant sought partition of twelve items of property. Courts below found that only item No.4 of the plaint schedule properties is available for partition. Availablity of item No.4 for partition was not challenged by respondents and hence that finding has become final. The question is whether items 1

to 3 and 5 to 12 are available for partition. The claim of appellant was that item Nos.1 and 2 of the plaint schedule properties exclusively belonged to deceased Narayanan under Ext.A1 marupattam and item No.3 exclusively belonged to deceased Narayanan under Ext.A2 marupattam. Learned Sub Judge on the evidence found that there is no evidence, apart from the self interested recitals in Ext.A1 and A2, to prove that the marupattams were acted upon and deceased Narayanan was holding the properties as a tenant under Ext.A1 and A2. Learned District Judge also considered the evidence and confirmed that finding. As is clear from Ext.B69 Will executed by Kandan Koran and also from the recitals in Ext.A1, properties covered under Ext.A1 are the properties bequeathed by deceased Kandan Koran as `E` schedule under Ext.B69 Will for religious purposes. Though it was stated in Ext.A1 that item No.1 of the properties thereunder was in the possession of Kandan Koran on lease hold right

and it was taken assignment by deceased Narayanan and items 2 and 3 of Ext.A1 were orally obtained on lease by deceased Narayanan from deceased Kandan Koran and Narayanan had to pay a rent of Rs.1/- per annum for the payment of Rs.75/- as melpattam, there was no evidence either to prove the oral lease or the assignment or that the alleged lease was ever acted upon. As rightly found by courts below a marupattam like Ext.A1 and A2 could be executed by a person without the knowledge of the landlord. When such a marupattam is executed, it is for the landlord to accept the marupattam and in token of acceptance handover a signed copy of the marupattam to the tenant. No such accepted copy of the marupattam was produced. There is absolutely no evidence to prove that Ext.A1 marupattam was acted upon or any rent was paid by deceased Narayanan. The courts below found that deceased Narayanan had no right over the properties under Ext.A1 and therefore it is not available for partition. According to

appellant, item No.3 of the plaint schedule properties was obtained under Ext.A2 marupattam on 14.3.63 executed by Narayanan in favour of respondents 1 to 4. Ext.A2 shows that properties wee in the possession of respondents 1,3 and 4. According to respondents, it was under Ext.B69 they are in possession. Though Ext.A2 contains a recital that there was an oral lease in his favour, there is no evidence even to probabilise the oral lease. As stated earlier, no evidence was adduced to prove that Ext.A2, was accepted by respondents 1,3 and 4 or any rent was paid. In such circumstances, both the courts rightly found that item No.3 of the plaint schedule properties is also not available for partition. Though learned counsel appearing for appellant argued that Ext.A7 adangal extract shows that basic tax was paid for the properties once, a solitary payment of tax by the son of one of the landlords will not establish a lease in his favour.

11. Item Nos. 5 to 12 were sought to be

partitioned, by ignoring Ext.A8 registered partition deed. Appellant was represented by his mother second defendant in the partition deed. Though appellant contended that mother was acting against his interest, both learned Sub Judge and learned District Judge on analysing the evidence found that the contention was absolutely incorrect. Though non inclusion of item No.4 of plaint schedule properties, which was found to be available for partition, was taken as one of the grounds to show that partition under Ext.A8 was unjust and unfair, as rightly found by courts below, non-inclusion of one of the co-ownership properties in the partition deed, will not make the partition unjust and unfair. The left out item will always be available for partition between the co-owners. Therefore on that ground partition under Ext.A8 cannot be challenged. Under Ext.A8 partition deed, self acquired properties of Narayanan except, item No.4 of the plaint schedule properties in O.S.83/87, were

divided between the mother, wife and son of deceased Narayanan. Each of them are admittedly having one out of three shares. Properties included in the `A` schedule were allotted to the mother, and properties included in the `B` schedule were jointly allotted to the wife, and son. On analysing the evidence, courts below found that allotment under Ext.A8 was just and fair and there is no reason to hold that Ext.A8 partition was unfair. Nothing was pointed out to interfere with that finding of the courts below. It can only be held that item 5 to 12, the self acquired properties of deceased Narayanan having been divided under Ext.A8, the partition deed is binding on the appellant, and he is not entitled to seek partition of those properties.

12. Learned counsel appearing for appellant vehemently argued that in any event, item No.2 of `B` schedule properties allotted under Ext.A8 was alienated by second defendant mother without permission of the court, in favour of fourth

respondent and therefore that item should have been found to be available for partition. First of all, appellant has not challenged Ext.B3 sale deed executed by second defendant in favour of fourth defendant,before the trial court. In fact, fourth defendant was not impleaded as a defendant in the suit challenging Ext.B3. He was later impleaded only as one of legal heirs of the deceased first defendant. Even after impleading fourth defendant, the plaint was not amended incorporating a plea that Ext.B3 alienation in favour of fourth, by second defendant was without seeking permission from court and therefore the alienation was void. There is no claim for partition of the properties obtained by appellant and second defendant jointly under `B` schedule of Ext.A8 partition deed. As long as the suit is not for partition of the properties allotted to appellant and second defendant under Ext.A8 partition deed and that too between appellant and his mother, and as long as the

alienation made by second defendant in favour of fourth defendant was not challenged on the ground that it was not in the interest of the minor appellant and that too without obtaining permission of the court, appellant is not entitled to contend at the belated stage that item No.2 of the properties allotted jointly to the appellant and second defendant under Ext.A8 is to be divided between appellant and his mother and that too without seeking recovery of possession from fourth defendant who is now in possession of the property especially when fourth defendant is not a co-owner with appellant. When such a contention was not taken before the trial court or the appellate court, appellant is not entitled to raise a new case in the second appeal. On the evidence, courts below rightly found that only item No.4 of the plaint schedule properties in O.S.83/87 is available for partition and a preliminary decree was passed. No substantial question of law is involved in S.A.332/94. The

said appeal is therefore dismissed.

13. The fact that first defendant and her children are members of a marumakkathayam tharwad and the testator under Ext.B69 was the Karanavan of the tharwad was admitted. Under Ext.B69, Karanavan Kandan Koran bequeathed his properties described in schedule `A` to his niece first defendant and grandnieces defendants 2 and 3 making it absolutely clear that the properties are to be inherited through female descendants. The argument of learned counsel appearing for appellant was that when the uncle bequeathed his properties in favour of his niece and grandnieces, it could only be a bequest to the thavazhi consisting of first defendant and her children and the children in the female descendants and first appellate court did not appreciate the facts and the recitals in Ext.B69 in the proper perspective and wrongly interfered with the findings of the trial court. Learned Senior counsel appearing for respondents pointed out that in the plaint there

was no case for appellant that plaint schedule properties in O.S.84/87 are properties belonging to a thavazhi or that the bequest under Ext.B69 was for the thavazhi and instead plaint was framed as if properties belonged to a joint family consisting of first defendant and her children and now appellant is not entitled to contend that properties are thavazhy properties and being the son of a pre-deceased son of first defendant, he is entitled to a share. Learned Senior counsel also argued that as rightly pointed out by learned District Judge, there is no averment in the plaint that defendants 2 and 3, the daughters of first defendant, were not having any issues on the date of death of deceased Narayanan or on the commencement of the Joint Hindu Family System (Abolition) Act,1976 and as children born to defendants 2 and 3 and the children born to their daughters are members of the thavazhi, there should have been a specific recital in the plaint that there are no children

to defendants 2 and 3 and absence of such a plea establish that the claim for partition was not on the basis that plaint schedule properties are thavazhi, properties but only as joint family properties and therefore learned District Judge rightly appreciated the plea and rejected the claim of the appellant.

14. True, a reading of the plaint in O.S.84/87 does not show a specific case that plaint schedule properties, sought to be partitioned, are thavazhi properties. The specific case was that plaint schedule properties originally jointly belonged to Narayanan, and defendants 1 to 5 and till his death in 1972 the properties were in their joint possession and on the death of Narayanan, his 1/6th share devolved on sixth defendant widow and appellant the son and appellant is entitled to get his share separated. The arguments of learned counsel appearing for appellant was that parties were aware they are members of a thavazhy and defendants 1 to 5 and

deceased Narayanan were members of the thavazhi and though it was not specifically pleaded that the properties are thavazhi properties, parties were aware of the case and therefore want of specific pleading by itself is not a ground to deny the right of appellant to a share especially when the question is to be settled by the court on interpreting Ext.B69 Will. The argument is that the question as to whether the bequest under Ext.B69 was in favour of thavazhi or in favour of defendants 1 to 3 individually is a question of law to be decided and therefore claim of appellant cannot be rejected for want of specific pleading.

15.The object and purpose of pleading is to enable the adversary party to know the case it has to meet. For a fair trial it is imperative that the party should state the essential material facts so that other party may not be taken by surprise. At the same time pleadings should receive a liberal construction and no pedantic

approach should be adopted to defeat justice on hair splitting technicalities. It may be that sometimes pleadings are expressed in words which may not be sufficient to make out a case in accordance with the strict interpretation of law. In such a case it is for the court to ascertain the substance of the pleading to determine the question. Apex Court in **Ram Sarup Gupta v. Bishun Narain Inter College (AIR 1987 SC 1242)** held:-

> "It is not desirable to place undue emphasis on form, instead the substance of the pleadings should be considered. Whenever the question about lack of pleading is raised the enquiry should not be so much about the form of the pleadings, instead the Court must find out whether in

> substance the parties knew the case and the issues upon which they went to trial. Once it is found that in spite of deficiency in the pleadings parties knew the case and they proceeded to trial on those issues by producing evidence, in that event it would not be open to a party to raise the question of absence of pleadings in appeal."

A constitution Bench of Apex Court in **Bhagwati Prasad v. Shri.Chandramaul (AIR 1966 SC 735)** considering this aspect held:-

> "If plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the

said plea as involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely in the issues, and evidence has been led about them, then the

argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the court has to consider in dealing with such an objection is, did the parties know that the matter in question was involved in the trial, and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of

> it, that undoubtedly would be a different matter. To allow one party to rely upon a matter in respect of which the other party did not lead evidence and has had no opportunity to lead evidence, would introduce considerations of prejudice, and in doing justice to one party, the Court cannot do injustice to another."

Another Division Bench of the Apex Court in **Kedar Lal v. Hari Lal (A.I.R.1952 SC 47)** considering the insufficiency of the pleadings held:-

> "I would be slow to throw out a claim on a mere technicality of pleading when the substance of the

> thing is there and no prejudice is caused to the other side, however clumsily or inartistically the plaint may be worded. In any event, it is always open to a Court to give a plaintiff such general or other relief as it deems just to the same extent as if it had been asked for, provided that occasions no prejudice to the other side beyond what can be compensated for in costs."

That position has been reiterated by the Apex Court in **Smt.Rajbir Kaur's case (supra).**

16. The question is whether defendants were aware that appellant is claiming a share on the basis that his father Narayanan was a member of

the thavazhi and the plaint schedule properties belonged to the thavazhi. When appellant was examined, it has been deposed by PW1 that plaint schedule properties are thavazhi properties and his deceased father is entitled to a share being a member of the thavazhi. The evidence of PW1 that his father was a member of the thavazhi was not at all challenged. Learned Sub Judge on appreciation of evidence found that plaint schedule properties are thavazhi properties and being son of a deceased member of the thavazhi, appellant is entitled to a share and a preliminary decree was passed. That preliminary decree was challenged before District Court in A.S.246/88. The appeal memorandum in A.S.246/88 reveal that respondents, who are the appellants in that appeal, did not take up a contention that they were not aware of the case of appellant that a share is being claimed either on the basis that plaint schedule properties are thavazhi properties or that his deceased father was a member of the thavazhi. There was no case

that for want of specific plea defendants could not meet that case or were prejudiced. Therefore even though there was no specific pleading, it cannot be said that parties were unaware of the case of the appellant that he is claiming a share in the plaint schedule properties on the ground that his father was a member of the thavazhi and plaint schedule properties are thavazhi properties and on the death of his father, the right devolved on appellant as son of the deceased member of the thavazhi. Hence for want of pleading alone, appellant cannot be denied a share in the plaint schedule properties, if plaint schedule properties are thavazhi properties and appellant is entitled to a share due to his father.

17. Tharwad is a marumakkathayam joint family, consisting of a female ancestor and her children, her daughter's children and daughter's daughter's children and other descendants in the female line. The tharwad membership arises by birth in the family and a person governed by marumakkathayam

belongs to the tharwad of his or her mother. Every member of the tharwad acquires an interest of tharwad properties by reason of his or her birth. A thavazhi is a branch of the tharwad. It comprises a group of descendants in the female line of a female common ancestor who is the member of tharwad. Thavazhy is one of the units of the tharwad. A thavazhi is constituted by a marumakkathayee woman with her children and further descendants in the female line. A tharwad or tavazhi comes into existence only by the operation of marumakkathayam law. They cannot be created by acts of parties. Kandan Koran was admittedly the karanavan of the tharwad. First defendant, the niece of Kandan Koran was admittedly a member of the tharwad. Her thavazhi consists of her sons defendants 4 and 5 and deceased Narayanan and daughters defendants 2 and 3, and children of defendants 2 and 3, if any and their children in the female line. Under Ext.B69 the Karanavan of the tharwad, Kandan Koran, bequeathed `A` schedule

properties therein in favour of his nieces and grandnieces defendants 1 to 3. The crucial question is whether the bequest was in favour of the thavazhi of first defendant or in favour of defendants 1 to 3 personally. The argument of learned counsel appearing for appellant was that a reading of Ext.B69 establish that intention of the testator was to bequeath the properties to the thavazhi as it has been specifically recited that the properties are to be enjoyed in the female line. The argument of learned Senior counsel was that the thavazhi was consisting of not only defendants 2 and 3 the daughters but also defendants 4, 5 and Narayanan the sons of first defendant and sons of first defendant who are also the members of the thavazhy were excluded in the Will and hence the bequest could only be in favour of defendants 1 to 3 individually and the said artificial group cannot be termed a thavazhi. It was argued that if only the bequest or gift was to a natural group of thavazhi, it could be taken

as a bequest or gift to the tavazhi and as male members of the thavazhi were excluded, it could only be taken as a bequest in favour of defendants 1 to 3 individually. Learned Senior counsel also pointed out that learned District Judge appreciated the facts in the proper perspective and for valid reasons held that bequest was not to the thavazhy and there is no reason to interfere with that finding. It was also argued that though learned District Judge did not cite the decisions in support of the view taken by him, the decision of the High Court of Madras in **Naina Pillai's case (supra)** and the decision of this Court in **Ammukutty's case (supra)** and the **Central Banking Corporation's case (supra)** support the view taken by the first appellate court.

18. The High Court of Trav**ancore Cochin in Central Banking Corporation's case (supra)** considering the claim for a share in the tharwad properties as tenants in common and not as

constituting a thavazhi or sub tarwad held:-

> "A thavazhi in Marumakkathayam Law must consist of a natural group of persons and cannot be created artifically by consent of parties."

In **Kallianikutty v. Devaki Amma (1950 K.L.T. 705)** it was held that a marumakkathayam group as a legal entity or thavazhi cannot be created ad hoc and to be a legal entity, the group must be a natural group comprised of a mother and her children and their descendants in the female line. In that decision, the dictum in **Madhava Menon v. Kunji Amma (29 Coch.503)** that a thavazhi cannot be created by mere agreement among the members of a tharwad and that where property is acquired by some alone of the members of the tharwad, who are incapable of constituting a thavazhi or corporate unit as understood in Marumakkathayam Law and they do not

hold such property with the incidents of ordinary thavazhi property, was quoted with approval and it was held that Marumakkathayam Law does not recognise an artificial group composed of some children alone of a mother as a thavazhi.

19. The question whether there is a presumption under marumakkathayam law that the property given by husband to his wife and children or to his wife alone or to one or more of his children or the property given by an uncle to the niece or nieces, is a gift to the thavazhi has come up for decision before various courts. Section 48 of Madras Marumakkathayam Act which came into force on 1.8.1933, set at rest the question. Where a Marumakkathayi male bequeathes or makes a gift of any property or purchase any property in the name of his wife alone or his wife and one or more of his children by such wife together, such property is to be taken as thavazhi property by the wife, her sons and daughters by such person and the lineal descendants of such daughters on the female

line unless a contrary intention appears from the Will or deed of gift. Apart from provisions of Marumakkathayam Act, there has always been a presumption with regard to the gift by the father to the wife and the children to be enjoyed in the female line or when a gift or bequeath is made in the name of niece or grand nieces, that the gift is for the thavazhi.

20. In **Narayanan v. Kannan (1884) I.L.R.7 Madras 315)** a gift by the father in favour of his two sons and daughters with a provision that properties were to be enjoyed by the donees and the descendants of the daughter in the female line came up for consideration. The Division Bench held that the wording of the gift deed passed an absolute estate to the grantees as tenants-in-common and the further restriction that the land should be enjoyed by the donees and the descendants of the daughter in the female line for ever was repugnant to the absolute estate granted by the document and therefore the donees derived an

absolute interest in the property. This decision was doubted in later cases as it is opposed to the principles laid by the Judicial Committee in **Sreemutty Soorjeemoney Dossee v. Denobundoo Mullick (1857) 6 M.I.A 526)and Mahomed Shumsool v. Shewukram,(1874) L.R.2 I.A.7)** that in construing a document executed by a Hindu, due weight should be given to the notions and ideas of an ordinary Hindu donor and to the ordinary method of enjoying the property. As the ordinary mode of holding property in the West Coast was what may be called the tarwad or thavazhi right, it was held that a donor in Malabar should be presumed to intend that the donee should enjoy the property as thavazhi property. The question was then referred to Full Bench in **Kunhacha Umma v. Kutti Mammi Hajee (1892) I.L.R. 16 Madras 201.)** The Full Bench held:-

> "In the case before us, the donor expressed no intention as to how the properties should be

held by the donees and, in the absence of such expression, the presumption is that he intended that they should take them as properties acquired by their branch or as the exclusive properties of their own branch, with the usual incidents of tarwad property in accordance with the Marumakkattayam usage which governed the donees. This view is in accordance with the principle laid down by the Privy Council in Sreemutty Soorjeemoney Dossee v. Denobundoo Mullick and Mahomed Shumsool v.Shewukram. The decision in Narayanan v. Kannan was not followed in Moidin v. Ambu and it appears to us to be in conflict with the rule of

construction indicated by the Privy Council."

The proposition so laid down was taking into consideration the ordinary notions and wishes of persons in Malabar in the position of the donor and the ordinary incidents of property in that District as held by the Division Bench of the Madras High Court in **Thatha Amma alias Rugmini Amma v. Thankappa alias Madhava Mannadiar (1947 ILR Madras 272).**

21. In **Mahomed Shumsool's case (supra)** gift was made by a Hindu in favour of a female. There was no indication in the gift deed whether the grantee was to take an absolute estate or only a life estate. The Judicial Committee held that having regard to the ordinary notions of a Hindu testator, the presumption is that he would not ordinarily intend a female grantee to take an absolute estate and that he would like to preserve the property in the family. Unless there were

words expressly granting an absolute estate, the presumption should be that the female grantee takes only a life estate. Another Division Bench of the High Court of Madras in **Naku Amma v. Raghava Menon (1912) I.L.R.38 Madras 79)**considered the case of a deed of gift, which clearly expressed in favour of the wife and her children. It was held that gift was to her and her children and their Lordships find no warrant for construing a gift so expressed as conferring on the donee an asbolute title to the property given, where, the donee is the wife of the donor and a member of marumakkathayam tarwad.

22. A Full Bench of the Madras High Court **Chakkara Kannan v. Kunhi Pokker (1913) ILR 39 Madras 317)** considered a similar question and held that the decision in **Kunhacha Umma's case (supra)** should be confined to a case where the donees formed a separate thavazhi with karnavan of its own and it cannot be extended to other cases. Full Bench answered the question namely when properties

are given by a person to his wife and children or children alone following the marumakkathayam law, do the donees constitute by themselves a tarwad or thavazhi. It was held that presumption is that the donees take the property with the incidents of tarwad. It was also held that in the case of gift by a person to his wife and her children, there was a presumption that they were intended to take the properties as the exclusive properties of the branch or the thavazhy of the mother. It was further held that in the absence of express provision, the presumption is that the property is to be enjoyed by the mother and her issue in the way in which property is customarily held and enjoyed among followers of Marumakkattayam Law. Their Lordships held:-

> "In the absence of express provision, the presumption is that the property is to be enjoyed by the mother and her issue in the way in

which property is customarily held and enjoyed among followers of the Marumakkattayam Law. The decision, Kunhacha Umma v. Kutti Mammi Hajee, proceeded on the authority of two decisions of their Lordships of the Judicial Committee which laid down that the law governing the parties is one of the circumstances to be taken into consideration in ascertaining the intention of the donor. As pointed out in the judgment of one of the Judges who made the reference to the Full Bench the presumption was arrived at in consideration of what

were known to be the notions and wishes of persons in the position of the donor and also of the ordinary incidents of property in the district. This view was accepted by the Full Bench of four Judges two of whom Muttusami Ayyar and Wilkinson JJ were well acquainted with Malabar, and that it was well founded is suggested by the fact that the decision has not only been accepted but has been given a considerable extension in the neighbouring State of Travancore, as pointed out during the argument by my

> learned brother speaking from his experience as Chief Justice of that State."

The decision of the Full Bench was that if the donees are all members of tavazhi, then it may be presumed that the donor intended that donees should take the property with the incidents attaching to tarwad property and that they were not entitled to hold it as tenants in common.

23. Another Division Bench in **Kuyyattil Kundan Kutty v. Vayalpath Parkum (1915) 32 I.C.107)** considered a document purported to be a sale deed but found to be really a deed of gift. The Division Bench in **Thatha Amma's case (supra)** took note of the changes in the society after the earlier decisions. It was held that whatever may have been the notions and ideas of Hindus in the early days of the last century, women are no longer considered to be incapable of holding properties of

their own and the central idea underlying the two decisions in **Sreemutty Soorjeemoney Dossee (supra) and Mahomed Shumsool (supra)** that a testator would like to have property within the family and would not like it to go out of family as would be the case if the woman donee or woman legatee gets an absolute estate has been gradually given up. Their Lordships held:-

> "Many inroads have been made into the joint family system as understood in the early decades of the last century. Any individual member can, by his mere declaration of intention, become divided from the rest of the family. Gains of science are now declared by statute to be the separate property of the acquirer. Women have gained

prominence and are no longer dependent on "the father in youth, on the husband during coverture and on the children in old age". This topic has been considered in Mayne's Hindu Law (Tenth Edition) at pages 908 and 909. As pointed out by the learned author in section 775, section 95 of the Hindu Wills Act which governs the wills of all Hindus lays down a rule of construction as to a gift simpliciter which is uniformly applicable to all cases whether the gift is to a female or a male. Where property is bequeathed to any person, he or she is entitled to the whole interest of the

testator therein unless it appears from the will that only a restricted interest was intended for him or her. Rules of construction which are intended to aid Courts of law in ascertaining the wishes of the testator have to be adapted with changing times. If therefore the rule of construction laid down in Sreemutty Soorjeemoney Dossee v. Denobundoo Mullick and in Mahomed Shumsool v. Shewukram is no longer applicable in cases governed by Hindu law, it is a matter for consideration whether the decision in Kunhacha Umma v. Kutti Mammi Hajee, based as it is expressly on the rule

of construction in Sreemutty Soorjeemoney Dossee v. Denobundoo Mullick and Mahomed Shumsool v. Shewukram, should be adhered to. At any rate, it should, we think, be confined to a case of a gift to a wife and all her children where the wife is alive or if she is dead to all the children who form a tavazhi. Even in Malabar times have changed. Impartibility which is the fundamental characteristic of a Malabar tarwad has been put an end to by the Madras Marumakkattayam Act. Constant intercourse with the rest of India has brought about considerable changes in

the ideas and notions of people on the West Coast. Confirmably to the progressive ideas of that community the Legislature enacted the above Act. Wives are now given substantial rights in the husband's properties. We have no hesitation in saying that the whole question must be reviewed when the question directly arises for decision and is not covered by Section 48 of the Marumakkatayam Act. A reasonable solution is to hold that, except in cases governed by Section 48 of the Act, there is no presumption that the donees do not get absolute rights."

But this decision was dissented by another Division Bench of the Madras High Court in **Kuttayi Lakshmi v. Puthia Purayil (A.I.R.1954 Madras 235).** Justice Govinda Menon speaking for the Bench held:-

> "With all deference to the learned Judges this is not stating Marumakattayam law as it is. Though the basis of the decision in Kunhacha Umma v. Kuttimammi Hajee, 16 Madras 201 (F.B.), (B),is the judgment of the Judicial Committee in -Sreemutty Soorjeemoney Dossee v. Denobundoo Mullick 6 Moo Ind.App.526(PC) and -Mahomed Shumsool v. Shewukram, 2 Ind App 7(PC) (D) still, ever since the decision of the Full Bench in-Chakkara Kannan

v. Kunhi Pocker, AIR 1916 Madras 391 (FB) (E), it has been the recognised rule of law that where a person governed by the Marumakkatayam law makes a gift, or purchases property in the name of his wife and children, or children alone, then the presumption is that the donees take the property with all the incidents of Marumakkatayam property. We do not think that decisions subsequent to the Full Bench have in any way made inroads upon that proposition. We have to take it that apart from S.48, Madras Marumakkatayam Act, the presumption has been

> correctly stated by the Full Bench in ~AIR 1916 Madras 391 (FB) (E). That being the case, there can be no doubt whatever that the donees in the present case take the gifted property with all the incidents of tarwad property."

Their Lordships quoted the observations of **Srinivas Ayyangar,J. in AIR 1916 Madras 391** regarding the origin and genesis of tavazhi properties as follows:-

> "I am also of opinion that some only of the members of a tavazhi cannot form a corporate unit capable of holding property as such. The husbands of the female members and the

children of the male members of a tarwad are not members of the tarwad. It is not uncommon for them to make gifts of properties to their wives, daughters or sisters and their children, and such properties are called Puthravakasam properties."

Sundara Ayyar's Malabar Law, discussed the question as follows:-

"However, the inference has been drawn in a case where the gift was by the uncle to his nieces, the mother being dead,(See "Letters Patent Appeal

No.19 of 1916"). Having regard to the usual origin of tavazhi property from fathers, uncles and brothers as stated by Sankaran Nair, J. in AIR 1916 Mad.391 (FB) (E), it would seen legitimate in all those cases to draw the inference."

The Division Bench held:-

"There are also other decisions which hold that when the donor is the uncle or brother, still if the donee forms a natural group according to Marumakattayam law, then the presumption is that the gift is to a

tavazhi."

The High Court of Madras in **Kundan Kutti v. Parkum (AIR 1917 Madras 726)** construing a gift made by an uncle to his nieces held that where an uncle following Marumakkatayam law makes a gift to his nieces, who are children of the same mother and there is nothing in the deed to indicate that an absolute inalienable estate was intended to be conferred on the donees, then the property was intended to be given as putravakasam property and that it should devolve as tavazhi property. His Lordship held:-

> "Where a Marumakattayam donor gives properties to the children of the same mother or to a member of a tavazhi without any express indication that an absolute alienable estate was granted, the presumption is that the donor intended to confer only an

estate with all the incidents of tarward property."

The Division Bench in **Kuttayi Lakshmi's case** observing that a tavazhi as such can purchase property so that the future members born in that group will have rights in the property by right of birth held that if such a group can acquire, hold and dispose of the property,there is no reason why the same group cannot take a gift from a near relative. Their Lordships held:-

> "The question in most of the cases would be, what was the intention of the donor. If the donor does not specifically make it clear that individual donees are to take the gift as tenants in common, the natural presumption, which is in consonance with ordinary ideas and notions of people

following Marumakattayam law, is that the intention of the donor was that those to whom he makes a gift of the property should hold the same as a group or entity with all the incidents of tarwad property attached to it."

24. The Full Bench of this court in **Kalliani Amma v. Krishna Pillai (1956 KLT 803)** considered the earlier decisions. After referring to gifts of this type and quoting Sundara Iyer in Malabar and Aliyasanthana Law where it was stated that another way in which the thavazhi comes to own property is by gifts from father or brother or uncle, for the matter of that, gifts from anybody provided that the gift is intended to enure for the benefit of the branch as such and not merely for the benefit of the individual members. The only difference between the gifts last named and others is that whereas there is generally a presumption in the

former case that the gift, is intended to enure for the benefit of the branch, in other cases it must be made out to be so. The Division Bench decision rendered by Justice **Govinda Menon in Kuttayi Lakshmi v. Puthia Purayil (supra)** was approved and it was held:-

> "Applying the test laid down in the above cases, it seems to us that in the absence of and apart from the legislation which intervened the gift Ext.I would enure not to the donee 2nd defendant alone but to the thavazhi composed of herself and descendants in the female line."

A learned single Judge of this court in **Sathyabhama Amma v. Taluk Land Board (1978 KLT 359)**held that merely because the bequest was apparently in the

name of the nieces, it cannot be presumed that it is for the benefit of the donee individually. His Lordship held:-

> "The real test is as to whether a contrary intention to demolish the presumption that when a marumakkathayi makes a gift or bequest in favour of a niece, it enures to the benefit of her thavazhi, not to her exclusively, is contained either in express terms or by necessary implication in the deeds of gift and bequest."

25. The legal position is now settled. When a bequest is made by the uncle of a marumakkathayam tharwad, in favour of his wife, or daughter or niece or grandnieces, the bequest is presumed to be not for them individually but shall enure to the

benefit of their thavazhi. The question whether the gift or the bequest is for the benefit of the donees individually or shall enure to the thavazhy is to be resolved on the intention of the donor or the testator. In the absence of specific stipulation that it is for the donees or the persons mentioned in the Will individually and as tenants in common, the normal presumption in consonance with the ordinary ideas and notions of people following Marumakkathayam Law is that the intention of the donor or the testator was that donees or the persons to whom the bequest is made shall hold the properties with all the incidents of tarwad property attached to it.

26. The crucial question is whether Ext.B69 will disclose the intention of the testator that the bequest made thereunder was in favour of defendants 1 to 3 individually or for the benefit of their thavazhi. If there is no contra intention in Ext.B69 that the bequest shall enure to defendants 1 to 3 individually, as tenants in

common, it can only be taken that the bequest was not to defendants 1 to 3 individually but shall enure to the benefit of the thavazhi and the bequest confer an estate with all incidents of a thavazhy property, because of the presumption available to any bequest made by a marumakkathayi male in favour of his niece and grandnieces.

27. The properties bequeathed under Ext.B69 are are self acquired properties of deceased Kandan Koran as seen from the document. First defendant is the niece and defendants 2 and 3 the daughters of first defendant are grandnieces of deceased Kandan Koran. Under Ext.B69 the self acquired properties of Kandan Koran were bequeathed under six schedules. The properties shown in `A'schedule were bequeathed in favour of the niece and grandnieces defendants 1 to3. The properties shown under `B' schedule were bequeathed in favour of nieces Kalliani and Chittai and the daughters to be born to them. The properties shown under `C` schedule were

bequeathed to another niece Manikkam and her daughters Madhavi and Kunjamma and the daughters to be born to them. Properties shown under `F` schedule were bequeathed to his wife Kalliani and the daughter of deceased elder sister of Kalliani. Properties shown in the `E` schedule were set apart for religious purposes. The properties shown in the `D` schedule were jointly bequeathed to the parties to whom A to C schedule properties were bequeathed. There is a specific recital in Ext.B69 that the properties allotted under schedule A, B,C, D, F (excluding `E` schedule property) are to be enjoyed permanently as "marumakkathayam properties through female descendants." The argument of learned counsel appearing for appellant was that `A` schedule properties under Ext.B69 were bequeathed to tavazhi of first defendant consisting of the mother and daughters defendants 2 and 3, making it clear that properties are to be enjoyed through female descendants and the further stipulation in

Ext.B69 that the properties are ever to be enjoyed through female descendants as marumakkathayam properties make it absolutely clear that the intention of the testator was to bequeath the properties in favour of thavazhi and therefore properties obtained by defendants 1 to 3 under Ext.B69 is not their individual property but thavazhi properties. Learned counsel argued that even if there is some doubt, for the non-inclusion of the sons of first defendant, the latter clause which shall prevail, makes it clear that properties were bequeathed in favour of the thavazhi and therefore deceased Narayanan who died in 1972 before coming into force of Joint Hindu Family System (Abolition) Act, 1976 had equal right over the properties with defendants 1 to 5 and that 1/6th share of deceased Narayanan devolved on appellant and sixth defendant and appellant is entitled to get the said share separated. Learned counsel also argued that though there was no specific pleading that

properties are tavazhy properties parties were aware of the contentions and therefore learned District Judge should not have interfered with the findings of the trial court.

28. A reading of Ext.B69 undoubtedly reveals that the intention of Kandan Koran, the testator, in bequeathing the properties in favour of defendants 1 to 3 was not that it should enure to the benefit of defendants 1 to 3 individually but to their thavazhy. Ext.B69 shows that properties were bequeathed thereunder to first defendant and her daughters who are his niece and grand nieces under `A` schedule, niece Kunjali and her daughter as `B` schedule, niece Manikkam and grandnieces Madhavi and Kunjamma as `C` schedule and to the daughter of the testator and his sister-in-law as `F` schedule. `E` schedule properties were set apart for religious purpose. It is clear from the bequest made for the respective nieces that the bequest was to the nieces, grandnieces and to the female descendants to be born to them. The

properties included in the `A` schedule thereunder was given not to defendants 1 to 3 as tenants in common but to defendants 1 to 3 and to the daughters born to them thereafter. Moreover after setting apart the properties, the testator has made his intention and the position absolutely clear that the properties set apart under `A to F' schedule shall always be enjoyed as marumakkathayam thavazhi properties through female descendants. Therefore the intention of the testator as is clear from Ext.B69, was that the bequest was not in favour of defendants 1 to 3 individually but to defendants 1 to 3 and their daughters and their female descendants. If that be so, it can only be found that the intention of the testator, who was none other than the karnavan of a marumakkathayam tharwad, was that the bequest shall to enure to the benefit thavazhi consisting of the first defendant.

29. The argument of learned Senior counsel was that the thavazhi of first defendant on the date of

execution of Ext.B69 shall consist of not only defendants 1 to 3 but also defendants 4, 5 and deceased Narayanan, the sons of the first defendant and as they were not included the bequest cannot be for the thavazhi, as without defendants 4, 5 and Narayanan, defendants 1 to 3 by themselves cannot constitute a thavazhi. The argument is that when the sons of the first defendant are not included, the bequest could only be to defendants 1 to 3 personally and that group could only be an artificial group and such a thavazhi created by an act of parties is not thavazhy and as rightly found by learned District Judge, the bequest in favour of an artificial group cannot be taken as for the thavazhi. In support of that argument, decision of the High Court of Travan**c**ore Cochin in **Central Banking Corporation (supra)** was relied on. That was a case whereunder a partition deed executed by members of the tharwad, whereunder properties were set apart to defendants

1 and 2 therein, who were the brothers was considered. Their sisters were alive at the time of that partition. But they were left out of the group in which defendants 1 and 2 were included under that partition deed. In the group consisting of defendants 1 and 2 only two males were included. Their Lordships on the facts found that defendants 1 and 2 the brothers obtained the properties allotted to them under the partition deed in lieu of their shares in the tharwad properties as tenants in common and not as constituting a thavazhi or sub tharwad. Relying on the earlier decision that a thavazhi cannot be created by mere agreement of the members of the tharwad, their Lordships held that the group composed of defendants 1 and 2 alone is not a natural group which can constitute a thavazhi under Marumakkathayam Law and the properties allotted to that group in lieu of their shares in the tharwad property, can only be taken as their individual properties. As is clear from that case, defendants

1 and 2 the male members of the tharwad cannot constitute a thavazhi. That case cannot be equated with a case where the bequest was made in favour of a niece and daughters of the niece by a marumakkathayi male and without specifying that the properties are to be enjoyed as tenants in common and individually and not by their thavazhi. When a general presumption is available with respect to the bequest made by a marumakkathayi male in favour of niece and grandnieces, unless otherwise clear from the recitals of the Will that the intention of the testator was that the bequest was to enure only to the individual benefit of the nieces, it can only be taken as a bequest in favour of their thavazhi.

30. The learned District Judge had given the following reasons for holding that the bequest under Ext.B69 was not to enure to the benefit of the thavazhi but to defendants 1 to 3 individually.

1) There was no specific pleading that the bequest was for the thavazhi and the plaint

schedule properties were obtained by the thavazhi consisting of first defendant and her children and children of their daughters.

2) A thavazhi cannot be created by act of parties as all the female descendants of first defendant are not included in Ext.B69.

(3) There is no specific recital that defendants 1 to 3 are to enjoy the properties as thavazhi properties and the reference about ammathavazhi in Ext.B69 does not have any relevance.

(4) The conduct of defendants 1 to 3 in dividing the properties under Ext.A12 partition deed cannot be used to hold that the bequest was for the thavazhi.

31. First of all, the question whether the bequest was in favour of thavazhi or shall enure to the benefit of defendants 1 to 3 individually is a question to be decided on the interpretation of Ext.B69. The contention in the plaint itself was that properties were jointly owned and enjoyed by

first defendant and their children till the death of deceased Narayanan and on his death appellant and sixth defendant being wife and son of Narayanan are entitled to the share of deceased Narayanan. The fact that plaintiff and defendants and Kandan Koran were all members of the marumakkathayam tharwad is an admitted fact. Therefore on the ground of want of pleading alone, it cannot be held that the bequest is in favour of defendants 1 to 3 individually and not to enure to the benefit of the thavazhi. A proper appreciation of Ext.B69 makes it absolutely clear that intention of the testator was to make a bequest in favour of first defendant and her daughters and their female descendants. In such circumstances for non-inclusion of defendants 4,5 and Narayanan alone, the bequest cannot be termed for the benefit of defendants 1 to 3 alone and not for the thavazhi. Even if the gift or bequest is in the name of the wife or niece,and the children or children of the nieces were not included in the

gift or the Will, it cannot be said that for that reason alone the gift or bequest shall enure to the benefit of the wife or the niece alone and not for their tavazhy. On the otherhand, the general presumption available under Marumakkathayam Law is that the bequest is in favour of the thavazhi consisting of wife or the niece. If that be so, when the bequest is made in favour of the niece and grandnieces making it clear that the bequest shall enure to them and their descendants in the female line and added to that there is a further clarification that the properties are to be enjoyed as marumakkathayam properties, for ever through female descendants, gives no room for doubt that the bequest was not in favour of defendants 1 to 3 individually but in favour of thavazhi consisting of first defendant and her children and their female descendants. The recitals in Ext.B69 does not support the finding of District Judge that reference about the enjoyment of the property by female descendants is not as thavazhi properties

and instead to the persons named thereunder individually.

32. Moreover, it is to be born in mind the Rules of interpretation of a Will are different from the rules which governs interpretation of documents like sale deed, gift deed or mortgage deed or other instrument by which interest in immovable property is created. In those documents when there is any inconsistency between the earlier or subsequent part or specific clauses inter se contained therein, the former part will prevail over the latter part. But as far as interpretation of a Will is concerned, the subsequent part, clause or portion always prevail over the earlier part clause or portion because the testator is competent to change his mind and create another bequest in the place of the bequest already made. Therefore when there are inconsistent clauses, as the former clause could be changed by the testator, the latter clause shall always prevail. The principle is contained in Section 88 of Indian

Succession Act. Section 88 of India Succession Act reads:-

> "The last of two inconsistent clauses prevails- Where two clauses of gifts in a Will are irreconcileable, so that they cannot possibly stand together, the last shall prevail.
>
> Illustrations:- (i) The testator by the first clause of his Will leaves his estate of Ramnagar ~to A", and by the last clause of his Will leaves it "to B and not to A", B will have it.
>
> (ii) If a man, at the commencement of his Will gives his house to A, and at the close of it directs that his house shall be sold and the proceeds invested for the

benefit of B, the latter disposition will prevail."

Their Lordships in **K.Ambunhi v. H.G. Bhandary (AIR 1995 SC 2491)** held:

"A Will may contain several clauses and the latter clause may be inconsistent with the earlier clause. In such a situation, the last intention of the testator is given effect to and it is on this basis that the latter clause is held to prevail over the earlier clause. This is regulated by the well known maxim "cum due inter se pugnantia reperiuntur in testamento ultimum ratum est" which means that if in a Will there are two inconsistent provisions, the latter shall

prevail over the earlier (See: Hammond v. Treharne (1938) 3 All ER 308)."

Their Lordships cautioned that this rule of interpretation can be invoked only if different clauses cannot be reconciled.

33. Even if former clause in Ext.B69 whereunder defendants 1 to 3 and female descendants bequest could be interpreted as one to as it does not disclose the intention fully, the latter part of the Will which shall always prevail, explicitly provide that the properties bequeathed thereunder are to be enjoyed as marumakkathayam properties through female descendants. Therefore the finding of learned District Judge that `A` schedule properties obtained by defendants 1 to 3 under Ext.B69 are not thavazhi properties is erroneous . The bequest is with all the incidents of tavazhy properties. The bequest under Ext.B69 in favour of defendants 1 to 3 are not for them individually, but to the thavazhi of the first

defendant.

34. Under Ext.A12 partition deed defendants 1 to 5 divided the properties and allotted the shares respectively to each of them. The properties divided under Ext.A12 are the properties obtained by defendants 1 to 3 as `A` schedule of Ext.B69 Will and the properties allotted to first defendant as A schedule properties of Ext.A8 partition deed. The case of defendants was that the bequest under Ext.B69 is only in favour of defendants 1 to 3 personally and not to the tavazhi of first defendant. If that be the case, the properties obtained under Ext.B69 by defendants 1 to 3 should exclusively belong to defendants 1 to 3. If that case is accepted they could not have been partitioned with defendants 4 and 5 who did not derive any right under Ext.B69 as claimed by defendants. Learned Sub Judge relied on this fact to hold that the bequest under Ext.B69 is in favour of thavazhy. Learned District Judge held that the properties obtained by defendants 1 to 3 were not

thrown to the common hotchpot of the thavazhy as found by the learned Sub Judge. Learned senior counsel argued that unless there is evidence to prove that the individual properties of defendants 1 to 3 were brought to the common hotchpot with the knowledge that the properties are their individual properties and a voluntary abandonment of the separate claim could be inferred for the reason that the properties obtained under Ext.B69 were also divided under Ext.A12, it cannot be held that the bequest under Ext.B69 was to the thavazhy. Learned Senior counsel relied on the Division Bench ruling of the High Court of Madras in **Naina Pillai's case (supra). Madhavan Nair, J.** speaking for the Bench held:-

> "the person who alleges that the property is joint family property must show that the owner has voluntarily thrown the property into the joint stock with the intention

of abandoning all separate claims on it. In 50 Mad.582 (5), it was pointed out by Reilly, J. that: The separate property of a Hindu ceases to be his separate property and acquires the characteristics of his joint family or ancestral property, not by any physical mixing with his joint family or ancestral property, but by his own volition and intention, by his waiving or surrndering his special right in it as separate property. It is unnecessary to labour that point, as it underlies all the authoritative decisions on the subject from 1876 onwards. 3 I A 259(6) the case under the Oudh Talukdars Act referred to by Mr.Mayne.....see also 60 Cal.1253 (7) at p.1257.

The passage quoted from Mr.Mayne and

> these cases show that unless it is proved that plaintiff's husband had at any time a consciousness that these properties were his self acquired properties and a consequent intention to treat them as joint family properties, the properties in question cannot be claimed as joint family properties by the appellants. It must specially be so in a case like the present one where there have been fluctuations in legal opinion as to whether the enfranchised properties were in law to be treated as separate properties or joint family properties."

If the bequest under Ext.B69 was in favour of defendants 1 to 3 personally, defendants 4 and 5 could not have claimed any share in the properties. The very fact that defendants 4 and 5 were given equal shares with defendants 2 and 3 establish that

defendants 1 to 5 have never treated the bequest under Ext.B69 as an individual bequest in favour of defendants 1 to 3. Moreover when a proper reading of Ext.B69 unambiguously establish that the intention of the testator was to bequeath properties in favour of thavazhy of the first defendant, by giving `A` schedule properties therein to first defendant niece and defendants 2 and 3 the daughters of first defendant, Ext.B69 provide sufficient guideline as to how defendants 1 to 3 have treated the bequest in the light of the intention of the testator. By dividing the properties obtained under Ext.B69 along with defendants 4 and 5, defendants 1 to 3 by their conduct also proved that the bequest was not individually to defendants 1 to 3. Therefore it can only be held that Kandan Koran the testator who was the Karanavan of the tarwad executed Ext.B69 Will bequeathing `A` schedule properties therein in favour of thavazhi of first defendant though first defendant and her daughters alone were shown in

Ext.B69. But the bequest has definitely the incidents of tavazhi properties and therefore it can only be found that `A` schedule properties given under Ext.B69 are thavazhi properties of first defendant.

35.Though it was strenuously argued by learned Senior counsel that being the daughters, children of defendants 2 and 3 are also entitled to get a share and there was no plea in the plaint that defendants 2 and 3 did not have children on the date of commencement of Joint Hindu Family System (Abolition) Act 1976 and so appellant is not entitled to seek partition of the thavazhi properties, as pointed out by learned counsel appearing for appellant, even after the finding of learned Sub Judge that the bequest made under Ext.B69 was for the thavazhi it was challenged before the District Court, in the memorandum of appeal. There was no case that any of the thavazhi members, who are entitled to a share was not impleaded. There was also no case that defendants 2

and 3 have children before the commencement of Joint Hindu Family System(Abolition) Act,1976 and therefore for their nonjoinder suit for partition was not maintainable. In fact the quantum of share granted by the trial court on that basis was not disputed. Even when PW1 was in box, he was not asked whether defendants 2 and 3 had any children born to them before the commencement of the Joint Hindu Family System (Abolition)Act,1976, who are entitled to get share by their birth. Therefore it can only be held that on the death of deceased Narayanan father of the appellant, the thavazhi consisted of first defendant mother and her children, defendants 2 to 5 and deceased Narayanan. Each of them are entitled to get 1/6 shares. On the death of Narayanan, his right devolved equally on the widow sixth defendant and son appellant. Therefore each of them is entitled to 1/12 shares each. Defendants 1 to 5 are entitled to get 2/12 shares each.

36. Then the question is whether all the

plaint schedule properties are available for partition. The learned District Judge observed that item Nos. 3 to 8 are the properties sought to be partitioned in O.S.63/87 and divided under Ext.A8 partition deed. On going through the pleadings, it is seen that no contention that the properties sought to be divided are the same properties or some of the properties are identical are raised. Even at the time of evidence it was not pointed out that the properties are the same. In fact, though survey numbers are common a comparison of the schedule of the properties do not show that the properties are the same. If that be so, it cannot be held that some of the the properties in both the suits are the same. Moreover, plaint in O.S.84/87 itself makes it clear that the properties are not the same and the plaint schedule properties in O.S.83/87 are the self acquired properties of deceased Narayanan and the properties sought to be partitioned in O.S.84/87 are the properties obtained under

Ext.B69. Ext.A12 the partition deed entered into by defendants 1 to 5 shows that properties divided thereunder are the properties obtained by first defendant as `A` schedule of Ext.A8 partition and the properties bequeathed by deceased Kandan Koran under `A` schedule of Ext.B69. In fact if Ext.B69 was a bequest in favour of defendants 1 to 3, defendants 4 and 5, the sons, cannot have any right to claim a share in the said properties and they are not entitled to get share under Ext.A12 in the properties obtained under Ext.B69 or the properties obtained by first defendant under Ext.A8. But under Ext.A12 the properties were divided equally between defendants 1 to 5 as if the properties obtained under Ext.B69 are jointly by defendants 4 and 5 along with defendants 1 to 3, which could only be the case, if the bequest was in favour of thavazhi as claimed by the appellant. Therefore eventhough self acquired properties of deceased Narayanan were divided under Ext.A8 and in view of that partition, properties in O.S.83/87

are found to be not available for partition, appellant is entitled to get a share in the plaint schedule properties in O.S.84/87. It is made clear that at the time of passing the final decree proceedings, if it is found that any of the properties included in O.S.83/87 are also properties in O.S.84/87, those properties are to be excluded and plaintiff or the sixth defendant are not entitled to get a share in the said properties. The learned District Judge relying on Ext.B9 and B10 found that deceased Narayanan had no right over item No.13 of the properties as that property belonged to Cheriya Kannan. Exts.B9 and B10 establish that item No.13 of the properties exclusively belonged to Cheriya Kannan the brother of first defendant and it was assigned in favour of first defendant and the said property is not a tavazhy property. The factual finding of learned District Judge that item No.13 of the plaint schedule properties is not a thavazhi property and it is not a property included in Ext.B69 partition

deed was also not challenged. Therefore item No.13 of the plaint schedule properties in O.S.84/87 is not available for partition. The judgment of the learned District Judge that appellant is not entitled to a decree for partition in O.S.84/87 is unsustainable.

S.A.332/94 is dismissed. S.A.492/92 is allowed. The judgment in A.S.246/88 is set aside.A preliminary decree for partition is passed as follows:- The A schedule properties obtained by defendants 1 to 3 under Ext.B69 are thavazhi properties. Those properties are available for partition. They are to be divided into twelve equal shares. Plaintiff and sixth defendant are entitled to get one such shares each. They are entitled to apply for passing of a final decree. If in the final decree proceedings, while dividing the properties it is found that any of the plaint schedule properties were also the plaint schedule properties in O.S.83/87, which were divided under Ext.A8 partition deed, and held to be not available

for partition, those properties are to be excluded from division and plaintiff and sixth defendant are not entitled to a share in those properties and only the remaining properties are to be divided.

M.SASIDHARAN NAMBIAR

JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006